PUBLIC PROSECUTOR

v.

TAN NGAK PHIEW

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG JC
[CRIMINAL TRIAL NO. 2 OF 85]
27 AUGUST 1990

CRIMINAL PROCEDURE: *Dangerous drugs - Admissibility of answers and gestures made by accused after arrest - No caution issued - Applicability of s. 27 of Evidence Act - Drugs found in car where no concealed compartment - Applicability presumptions - Whether possession of car key sufficient - Sections 37(d), (g), (h), 37A of Dangerous Drug Act 1952.*

EVIDENCE: *Admissibility of answers by accused - Strict construction rule - Information - Section 27 Evidence Act.*

The accused was charged with the offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). The issues for the Court were firstly the admissibility of answers and gestures (including an alleged admission) made by the accused in response to questions by PW5, an inspector and secondly whether the accused was in possession of the car in which the drugs were found. The prosecution's case is that since the car key was found on the accused, it is implied that the accused had possession of the car and therefore the drugs.

Held:

[1] On a strict construction of s. 27 of the Evidence Act, the answers and gestures of the accused in relation to where the car was, whether there were drugs in the car and whether the 1st and 2nd Mazda cars were the cars were disallowed because:

i) no caution had been administered to the accused although he had been arrested.

ii) Section 27 of the Evidence Act could not be utilised because the "fact" had already been discovered before the question was asked.

[2] The head gestures of the accused in response to the question of whether the 3rd Mazda car was the car, was admissible under s. 27 as it was information which led to the discovery of a fact, (that is) a car .

[3] The presumptions under s. 37(d), (g) and (h) of the Act do not apply when drugs are found in a car in which there are no concealed compartments built-in.

[4] The prosecution had failed to prove that the accused had possession of the car in which the drugs were found:

(a) there were serious doubts as to where the car key was recovered;

(b) no finger-print dusting was carried out; this may have shed light on whether the accused had possession of the car keys.

(c) there is a total absence of evidence to show that the key itself was in the care and control of the accused and that the accused had some degree of exclusivity to the use of the said car.

[Accused acquitted and discharged.]

Cases referred to:
Wai Chan Leong v. PP [1989] 1 CLJ (Rep) 171
Syed Ali bin Syed Abdul Hamid v. PP [1982] CLJ (Rep) 340
PP v. Ng Lean Teik [1956] 22 MLJ 28
PP v. Aris bin Yunus [1989] 2 CLJ (Rep) 289
Tai Chai Keh v. PP [1948-49] MLJ 108

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da), (d), (g), (h), 37A
Evidence Act 1950, s. 27

For the accused - R.K. Menon; M/s. R.K. Menon & Co.
For the prosecution - Seah Hock Thean

JUDGMENT

James Foong JC:

The accused is charged as follows:

> Bahawa kamu pada 5 April 1984, jam lebih kurang 1.30 petang, di kawasan Flat Stulang Darat di Jalan Stulang Darat dalam Daerah Johor Bahru, dalam Negeri Johor Darul Takzim, bagi pihak diri kamu sendiri telah didapati mengedar dadah berbahaya, sejumlah berat 74.952 gram heroin, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) dan boleh di hukum di bawah seksyen 39B(2) Akta yang sama.

On 5 April 1984 at about 1.30 p.m. one Inspector Kamarudin (PW5) attached to the Cawangan Anti Dadah of Central Police Station, Johor Bahru together with a team of 7 police personnel raided a flat known as No. 26, Tingkat 3, Block B, Rumah Pangsa, Jalan Stulang Darat, Johor Bahru.

On arrival at the flat which has two bedrooms, Inspector Kamarudin knocked on the door of the flat.

A male Chinese, identified as the accused opened the door slightly. Upon identifying himself as a police personnel Inspector Kamarudin pushed open the door and saw the accused running towards a room at the rear of the flat shouting "Am Pai" which is taken to mean detectives.

Inspector Kamarudin and his team of police personnel gave chase. In the room where the accused headed to, he saw two other male Chinese seated on the floor and in his opinion they were taking drugs.

Inspector Kamarudin searched the bodies of all the three persons found in the room. From the accused he recovered a purse (P8) containing the accused's identity card (P6), driving licence (P7) and cash of RM272 (P9). Also from the accused he found a car key (P5) with the word Mazda and a key serial number imprinted thereon. According to Inspector Kamarudin these 2 items that is the purse and the car key were recovered from the rear pocket of the accused's sport shorts (P25) which he was wearing on that particular day.

During examination in chief of the Inspector Kamarudin, Inspector Kamarudin said that he asked the accused "siapa punya kunci?"

At this stage the defence Counsel objected to any reply given by the accused for the reason that it is not admissible since no caution under s. 37A of Dangerous Drugs Act 1952 was administered. The learned DPP submitted that the answer could be admitted under s. 27 of the Evidence Act.

After careful consideration I disallowed the admission for the following reasons:

a) I find that the accused was already arrested at the material time and no caution was administered to the accused under s. 37A of the Dangerous Drugs Act.

b) Section 27 of the Evidence Act cannot be utilised because the "fact" (that is) the key in this case had already been discovered before the question was asked by Inspector Kamarudin. As the fact (that is) the key was not discovered in consequence of information received from a person s. 27 of the Evidence Act cannot apply.

During the continuation of the testimony of Inspector Kamarudin during examination-in-chief, Inspector Kamarudin said that he asked the accused another question, "Mananya kereta?" The accused replied "Ada tokongnya tepi."

At this stage the defence Counsel objected to the admissibility of the answer given by the accused on the same grounds as previously stated. Similarly the learned DPP sought to admit the same under s. 27 of the Evidence Act.

Due to consistent interruptions relating to this point of admissibility of evidence under s. 27 of the Evidence Act, I decided to make a note of the defence Counsel's objections at various stages and will make a ruling on admissibility at the end of the evidence in chief of Inspector Kamarudin. If I rule that such evidence is not admissible then I shall exclude it.

Inspector Kamarudin then testified that he asked the accused another question "Ada pek hun dalam kereta?" The accused replied, "Gentleman cakap, ada sedikit." To this the defence Counsel made his objections.

The accused was then taken by Inspector Kamarudin and two other police personnel escorting, downstairs to the flat to an open area where cars of residents and visitors were parked. Inspector Kamarudin's intention was to look for a Mazda car.

The first Mazda car Inspector Kamarudin encountered, he asked the accused "Ini kereta?" According to Inspector Kamarudin the accused shook his head. The defence raised objections to the statement on the gesture of the accused.

On discovery of a second Mazda car Inspector Kamarudin again asked the accused, "Ini kereta?" The accused again shook his head. Here again the defence Counsel raised similar objections.

However on both these occasions despite the accused shaking his head, Inspector Kamarudin not believing the accused attempted to open the doors of the said cars with the said key but without success.

Finally, Inspector Kamarudin discovered a third Mazda car with a number plate that bears No. JAT 2608. This car was found near a Chinese looking pagoda apparently used for burning joss sticks and prayer paper and which is situated in the vicinity of the said flat. Here Inspector Kamarudin asked the accused "Ini kereta?" The accused nodded his head in agreement. This information relating to the accused's gesture was again objected to by the defence Counsel.

Inspector Kamarudin then ordered the accused using the said car key to open the boot of the car.

At the boot of the car, Inspector Kamarudin recovered a pink plastic bag which contained 3 newspaper wrappings all 3 of which contained a total of 60 plastic packets of substance which on analysis by the chemist (PW3) has a nett weight of 77.522 grams of heroin. There

was also a weighing scale kept in a plastic casing (P21A & B). Also found was a false set of number plates bearing No. WAR 7912. Upon discovery of these aforesaid items the accused was then handcuffed and brought back to the police station in the car JAT 2608.

At the end of the examination-in-chief of Inspector Kamarudin I proceeded on the analysis of the objection by defence Counsel.

I hereby deal with each of everyone of them:

a) **To question "Mana kereta?" where the answer was "Ada tokongnya tepi."**

I ruled that the answer is not admissible for reason that no caution under s. 37A of the Dangerous Drugs Act 1952 was administered.

Section 27 of the Evidence Act also cannot apply relating to its admissibility for reason that the car was not discovered as a consequence of the statement made by the accused. The accused did not point to or indicate the direction of the car to Inspector Kamarudin. In fact Inspector Kamarudin had to go looking for the car. Therefore, this statement cannot be said to have led Inspector Kamarudin to the discovery of a fact.

b) **"Ada Pek Hun dalam kereta?" Where the answer was "Gentleman cakap, ada sedikit.";**

I ruled that the answer is not admissible for reason that no caution under s. 37A of the Dangerous Drugs Act was administered.

Section 27 of the Evidence Act cannot apply relating to its admissibility for reason that the drug was not specifically discovered as a consequence of the statement made by the accused. Inspector Kamarudin did not know in which car the dadah was discovered. In fact as stated earlier, he went searching for a car of Mazda make. This information he most probably got from the imprint on the said car key itself. Further, the accused did not inform or point to Inspector Kamarudin which particular car it was. When the earlier reply of the accused "Ada tokongnya tepi" has been ruled inadmissible, I find that this answer "Gentleman cakap, ada sedikit," points to nowhere leading to the discovery of the drugs.

c) **"Ini kereta?" where the accused shook his head twice; are not admissible**. This gesture of the accused is "information" under s. 27 of the Evidence Act. This information led to no discovery since no car was found.

d) **"Ini kereta?" where accused nodded in agreement;**

I ruled this gesture as information and is admissible under s. 27 of the Evidence Act since it led to the discovery of a fact (that is) a car.

Attempts on the admissibility of evidence under s. 27 of the Evidence Act has of late been utilised by the prosecution to admit evidence which may amount to confessions in cases connected with dangerous drugs in circumstances where no caution was administered by the arresting authorities under s. 37A of the Dangerous Drugs Act 1952 and when the accused person was under arrest.

This is also as the result of the Supreme Court ruling in the case of *Wai Chan Leong v. PP* [1989] 1 CLJ (Rep) 171 where it was ruled that s. 27 of the Evidence Act and s. 37A of the Dangerous Drugs Act 1952 stands "independently of each other and are valid in law".

However, as stated by Gunn Chit Tuan SCJ in *Wai Chan Leong v. PP*, s. 27 of the Evidence Act "should be strictly construed and applied."

Under such circumstances, I applied the strict construction rule to the aforesaid "information." I therefore made my rulings accordingly as stated above and deleted as inadmissible the evidence which is affected by my aforesaid rulings.

The evidence of Inspector Kamarudin was corroborated to a certain extent by the evidence of constable Muda Mohd. (PW6), a member of the raiding party and one of the police personnel who accompanied Inspector Kamarudin and the accused to the car where the drugs were recovered.

PW6 however did not see from where Inspector Kamarudin recovered the key to the car JAT 2608 which is one of the important items in this case.

After the prosecution had closed its case, the defence Counsel submitted to me that unlike other drug cases the presumptions is under ss. 37(d), (g) and (h) of the Dangerous Drugs Act 1952 do not apply. This is due to the fact that the drugs in this case were found in a car boot.

After considering the case of *Syed Ali bin Syed Abdul Hamid v. PP* [1982] CLJ (Rep) 340 which is a Federal Court decision, I find that the aforesaid presumptions do not apply when the drugs are found in a car and in which there were no concealed compartments built therein.

The learned DPP submitted that the presumption under s. 37(da) of the Dangerous Drugs Act 1952 applies in this case against the accused.

Section 37(da)(i) reads as follows:

> Any one found in **possession** of 15 grammes or more in weight of heroin shall be presumed, until the contrary is proved, to be trafficking in the said drugs.

In view of the aforesaid the prosecution case therefore depends on whether the accused was in possession of the drugs. As the drugs were found in the car, whether the accused was in possession of the car.

The peculiar fact of this case is that the car JAT 2608 where the drugs were found was a stolen car. The investigating officer testified that this car was reported robbed on 12 June 1983, some 10 months before the discovery of the drugs therein.

The prosecution therefore tried to prove possession of the car with the recovery of the key to the said car from the accused and the appearance of the accused who looked frightened when Inspector Kamarudin finally found the Mazda car.

The definition of "possession" has always troubled Judges and Jurists. In the case of *PP. v. Ng Lean Teik* [1956] 2 MLJ 28 Taylor adopted the definition of possession as follows:

> the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of the other persons.

Taylor J went further in the same case to state that for possession there must also be some knowledge not necessarily full and exact knowledge and this can be inferred from all the circumstances of the case.

Shankar J, expressed his view on possession in *PP. v. Aris bin Yunus* [1989] 2 CLJ (Rep) 289 by stressing that there must be "sufficient exclusivity" in possession.

I fully agree with the views expressed aforesaid.

In this case before me the vital question to be decided is whether the said car key can imply to mean that the accused has possession of the car JAT 2608.

From the evidence so far adduced by the prosecution I do not find that the accused has possession of the said car where the drugs were found therein.

In the first instance I find that there are serious doubts as to where this car key was recovered. From the evidence of Inspector Kamarudin and this is the only evidence in this case relating to the recovery of the car key, he said that the said key was recovered from the rear pocket of the pair of sport's shorts worn by the accused. Together with the car key in the said pocket there was also a purse which contained cash of RM272, the accused's identity card and his driving licence.

On demonstration before the Court, Inspector Kamarudin could not even insert the purse into this rear pocket of this pair of sport's shorts. The reason being, the purse is simply far too big to fit the only rear pocket of the sport's shorts.

The said key as submitted by the defence Counsel could have been found elsewhere in the room where the raid was carried out.

I have personally studied this pair of shorts purportedly worn by the accused at the material time. The rear pocket is rather small. Though it can fit the said car key, the same can easily come loose due to its small size and shallowness. Further there is no flap to button up this rear pocket to prevent anything from falling out.

From my detailed examination of this rear pocket I am also of the opinion that it is unlikely someone would keep a car key there for, besides the same dropping off quite easily the sharp edges of the key could make sitting rather uncomfortable.

If the said car key was not found on the accused but elsewhere in the room that was raided then there is no evidence to implicate that the accused is in possession of the car and consequently the said drugs.

The defence Counsel also submitted that no finger print dusting was carried out by the police in this case. Though finger print dusting may not be necessary in other cases, but in this case such procedures should have been carried out especially, when the said car was a stolen car. Finger print dusting may have shed light on whether the accused has possession of the same.

As for the key, even if the key was found on the accused I am of the opinion that such evidence standing by itself does not imply possession. There must be some other evidence circumstantial or otherwise to show that the key itself is in the care and control of the accused and that the accused has some degree of exclusivity to the use of the said car. In this case there is a total absence of such other evidence.

There is no evidence that the accused was seen driving the car just before the discovery of the drugs. Neither were any items found in the car that can be said to have belonged to the accused.

The car key itself also bears no identification that can attribute some exclusive relationship of it to the accused such as a key holder with initials or other markings implicating that it belong to the accused.

The learned DPP also submitted that the accused was frightened when Inspector Kamarudin finally found the car. I find that this opinion of Inspector Kamarudin cannot be taken to mean that the accused is the possessor of the said car. In order to prove possession there

must surely be more than just being seen frightened. The accused may be frightened for many other reasons such as being escorted by the 3 police personnel walking around the whole vicinity of 2 to 3 blocks of flats with numerous residents and other onlookers.

Adopting the view of the Court of Appeal of *Tai Chai Keh v. PP* [1948-49] MLJ 108, "Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, one is of the opinion that the inference most favourable to the accused should be adopted."

In view of the aforesaid I find that the prosecution have not made out a *prima facie* case against the accused. The accused is thereby acquitted and discharged.

Also found at [1990] 2 CLJ 843